No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,
Plaintiff,
v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion for Leave To File Exceptions to First Interim Report of the Special Master

MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE EXCEPTIONS

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December 9, 2008

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MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO FILE EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

The State of South Carolina, by its Attorney General, Henry Dargan McMaster, and pursuant to Rules 17 and 21 of the Supreme Court's Rules, moves this Court for leave to file Exceptions to the First Interim Report of the Special Master filed November 25, 2008, for the reasons stated in the accompanying brief in support. South Carolina also respectfully requests that the Court establish an expedited briefing schedule permitting a Court decision before the close of the October 2008 Term.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 4

ARGUMENT:

I. THE ISSUE BEFORE THE COURT IS ONE OF SUBSTANTIAL IMPORTANCE AND MERITS IMMEDIATE REVIEW 7

II. THE RECOMMENDATION THAT THREE NON-STATE ENTITIES BE ALLOWED TO INTERVENE IS INCONSISTENT WITH CONTROLLING PRECEDENT 11

A. The Report Departs From Court Precedent 11

B. The Proposed Intervenors Are Not Entitled To Intervention 17

1. *Charlotte and CRWSP* 17

2. *Duke* 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California:

345 U.S. 914 (1953) 12

514 U.S. 1081 (1995) 12

Hood ex rel. Mississippi v. City of Memphis, 533 F. Supp. 2d 646 (N.D. Miss. 2008), *appeal pending*, No. 08-60152 (5th Cir.) 10-11

Kansas v. Colorado, 185 U.S. 125 (1902) 16

Kansas v. Nebraska, 538 U.S. 720 (2003) 10

Kentucky v. Indiana, 281 U.S. 163 (1930) 12, 13, 15, 16

Kimberly v. Arms, 129 U.S. 512 (1889) 7

Montana v. Wyoming, 129 S. Ct. 480 (2008) 10

National Farmers Union Ins. Cos: v. Crow Tribe of Indians, 471 U.S. 845 (1985) 14

Nebraska v. Wyoming:

295 U.S. 40 (1935) 16

296 U.S. 548 (1935) 12

507 U.S. 584 (1993) 12

515 U.S. 1 (1995) 14, 15, 16

New Jersey v. New York, 345 U.S. 369 (1953) ... 11, 12, 13, 15, 16, 17, 18, 19, 21

Southeastern Fed. Power Customers, Inc. v. Geren, 514 F.3d 1316 (D.C. Cir. 2008), *petition for cert. pending sub nom. Georgia v. Florida, et al.*, No. 08-199 (U.S. filed Aug. 13, 2008) 10

United States v. Nevada, 412 U.S. 534 (1973)....11, 14

United States v. Raddatz, 447 U.S. 667 (1980) 7

Wyoming v. Colorado, 286 U.S. 494 (1932)..... 16

ADMINISTRATIVE DECISIONS

PacifiCorp, 105 FERC ¶ 62,207 (2003), *clarified on reh'g*, 106 FERC ¶ 61,307 (2004) 22

Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power, 110 FERC ¶ 61,241 (2005)..... 21

CONSTITUTION AND RULES

U.S. Const. art. III, § 2, cl. 2..... 11

Sup. Ct. R.:

Rule 37.3 22

Rule 37.3(a)..... 22

Rule 37.3(b)..... 22

Fed. R. Civ. P. 24(a)(2)..... 17

ADMINISTRATIVE MATERIALS

Duke Energy Application for New License, Catawba-Wateree Project (FERC No. 2232) (FERC filed Aug. 29, 2006) 20

OTHER MATERIALS

Assoc. Press, *Kansas Threatens to Sue Nebraska Over Use of a River*, N.Y. Times, Dec. 20, 2007, at A29, *available at* http://www.nytimes.com/2007/12/20/us/20water.html 10

4 Robert E. Beck et al., *Waters and Water Rights* (1991 ed., 2004 replace. vol.) 16

Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 Southeastern Envtl. L.J. 115 (2004), *available at* http://www.olemiss.edu/orgs/SGLC/acf.htm 10

Guide for Special Masters in Original Cases Before the Supreme Court of the United States (Oct. Term 2004) 7

Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743 (2000) 22

Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (U.S. filed Nov. 27, 2001) 12

Report of the Special Master, *New Jersey v. New York*, No. 16, Orig. (U.S. filed Feb. 2, 1931) 18

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 7

7C Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2007) 17

BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE EXCEPTIONS TO FIRST INTERIM REPORT OF THE SPECIAL MASTER

South Carolina respectfully moves for leave to file exceptions to the First Interim Report of the Special Master ("Report"). The Report raises an issue of considerable and growing significance: under what circumstances (if any) may a non-state entity intervene in a dispute between two sovereign States over the equitable apportionment of an interstate river. In the Report, the Special Master erroneously recommends that the Court permit *three* such entities to intervene as defendants in South Carolina's suit against North Carolina: Duke Energy Carolinas, LLC ("Duke"), a for-profit commercial entity; the City of Charlotte, a political subdivision of North Carolina ("Charlotte"); and the Catawba River Water Supply Project ("CRWSP"), a cross-border joint venture between political subdivisions of North Carolina and South Carolina created for the purpose of diverting water from South Carolina to North Carolina. Unless rejected by this Court, the Special Master's recommendation will significantly increase the costs to South Carolina of this suit and greatly protract the Court's resolution of a suit with profound implications for water usage in North Carolina and South Carolina in a time of severe drought and water shortage.

In addition to the immediate consequences of this litigation, the Court should grant South Carolina's motion because the issue of appropriate standards for intervention under this Court's original jurisdiction is one of increasing importance. Similar interstate water controversies arise frequently before the

Court, including one case presently on the Court's original jurisdiction docket pending before a Special Master, and another in which a petition for a writ of certiorari is currently under review. This trend is likely to continue and — encouraged by the Special Master's recommendation in this case — individual water users and municipalities will likely seek to intervene to protect their particular uses.

Review of this issue is inevitable, and the interests of judicial efficiency and fairness to the party States favor the Court's immediate consideration. Pending this Court's review of proposed intervenors' status, the Special Master has made several discovery rulings permitting proposed intervenors to participate as parties with respect to document production. So as to lessen the recognized burden on South Carolina in having to litigate against four opponents, rather than one, the Special Master has declined to rule on intervention with regard to other aspects of discovery such as interrogatories, depositions, and expert reports pending this Court's review. Accordingly, as a practical matter, the case will not be able to proceed beyond document discovery until the question of proposed intervenors' status is resolved by this Court.

The legal issue presented is likewise important and ripe for decision now. This Court has never approved — but has often denied — intervention by non-state entities in an equitable apportionment case. As its precedent makes clear, such cases concern the apportionment of water *between and among* States, not how water is allocated *within* States among competing interests. Thus, the Court has declined to expand the narrow limits of its original jurisdiction with the explanation that, in matters of sovereign interest, the Court deems party States to represent all their citizens, both as a necessary recognition of sover-

eign dignity and as a working rule for good judicial administration.

The Report disregards the Court's well-settled principles by recommending that intervention by three non-state entities be permitted. The interests pressed by those putative intervenors, however, concern the allocation of water *within* the State of North Carolina — not the allocation of water *between* two States — and thus are precisely the sort of intramural water disputes that this Court has long held provide no basis for intervention in an original action. If allowed to stand, the Special Master's flawed recommendation would open the floodgates for numerous non-state entities to argue successfully for intervention in original actions.

Because the question of the appropriate legal standard for intervention in equitable apportionment actions is a recurring issue of exceptional importance to the management of this Court's original jurisdiction docket and is squarely presented by the Report, we ask the Court to (1) permit South Carolina to file exceptions to the Report, and (2) establish an expedited briefing schedule permitting a Court decision before the close of the October 2008 Term.[1]

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[1] In the alternative, the Court could deny the motions for intervention consistent with its controlling precedent. *See* South Carolina Br. in Opp. to Duke Energy Carolinas, LLC's Mot. for Leave To Intervene and File Answer (U.S. filed Dec. 11, 2007); South Carolina Br. in Opp. to Mot. of the Catawba River Water Supply Project for Leave To Intervene (U.S. filed Dec. 13, 2007); South Carolina Br. in Opp. to Mot. for Leave To Intervene of the City of Charlotte, North Carolina (U.S. filed Feb. 25, 2008).

STATEMENT OF THE CASE

The Catawba River flows from North Carolina to South Carolina and is subject to periods of inadequate flows, especially during times of drought. In recent years, these periods of inadequate flows have increased in both frequency and severity. At the same time, water use and population growth in North Carolina promise to expand dramatically, severely burdening an increasingly scarce resource. In this original action, South Carolina seeks an equitable apportionment of the Catawba River to ensure that, during times of low water flow, its citizens are not deprived of their equal rights in this interstate stream by North Carolina's consumptive uses of the river. South Carolina requests that the Court determine each State's equitable share of the river and enjoin North Carolina from consumptive uses of river water inconsistent with that apportionment.

Three non-state entities — Charlotte, CRWSP, and Duke — have each sought leave to intervene in this matter on the side of North Carolina. North Carolina has taken no position on the motions to intervene, but South Carolina has opposed their interventions. The Court referred the motions to intervene to the Special Master on January 15 (CRWSP and Duke) and February 13, 2008 (Charlotte).

On May 27, 2008, the Special Master issued a recommendation[2] that the Court grant each entity permission to intervene for the "limited purpose" of participating in arguments against any final decree

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[2] *See* Order Granting Motions for Leave to Intervene of the City of Charlotte, North Carolina, Catawba River Water Supply Project, and Duke Energy Carolinas, LLC (May 27, 2008) ("May 27, 2008 Recommendation"). Orders and pleadings filed by or with the Special Master are posted on the Special Master's website at http://www.mto.com/sm.

that would affect either their "unique interest" and "direct stake" in existing state authorizations to transfer water out of the Catawba River, or, in the case of Duke, its "unique and compelling interest" in its existing federal license and application for license renewal now pending before the Federal Energy Regulatory Commission ("FERC"). May 27, 2008 Recommendation at 8-12.

South Carolina understood the recommended grant of intervention for those "limited purposes" to mean that proposed intervenors could not participate as full parties in Phase One of the litigation, which the party States had agreed would be limited to determining whether South Carolina had sustained harm from North Carolina's consumptive uses and interbasin transfers of water from the Catawba River; Phase Two would address the balancing of factors under the Court's equitable apportionment precedent and, if appropriate, the fashioning of a decree equitably apportioning the river. In contrast, proposed intervenors expressed the view that they had full rights as parties to equal participation in all phases of the litigation, including propounding their own written discovery, participating in depositions, and filing their own expert reports. Accordingly, on June 27, 2008, South Carolina moved for clarification or, in the alternative, for reconsideration of the recommendation to grant intervention.[3]

The Special Master denied South Carolina's motion for clarification or reconsideration orally in a July 17, 2008 Telephonic Conference. South Carolina then requested that the Master's rulings be memorialized

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[3] *See* South Carolina Mot. for Clarification or, in the Alternative, for Reconsideration of the May 27, 2008 Order Granting Limited Intervention (June 27, 2008).

in an Interim Report for this Court's review. The Special Master ordered briefing on the issue of whether she should issue an Interim Report. Subsequently, the Special Master stated in an August 22, 2008 Telephonic Conference that she would issue an Interim Report.

In the meantime, to address proposed intervenors' role in discovery prior to this Court's review of their status, the Special Master made several rulings "pending the Special Master's issuance of an Interim Report regarding the issue of intervention and any proceedings in the Court with respect to such Interim Report." Case Management Order No. 7, ¶ 2 (Sept. 18, 2008) ("CMO No. 7"). Those rulings held that (a) document discovery may proceed "as though [proposed] [i]ntervenors were full parties";[4] (b) proposed intervenors may not propound interrogatories (or, as clarified subsequently, requests for admission); (c) "[d]eposition discovery shall be deferred pending final resolution of the intervention issue"; and (d) proposed intervenors may not serve third-party subpoenas. *Id.* ¶ 2(a)-(d). Accordingly, the case as a practical matter will not proceed into the deposition phase of discovery until this Court decides whether the proposed interventions should be granted or denied.

On November 25, 2008, the Special Master issued her First Interim Report, recommending that the Court grant the motions to intervene and deny South Carolina's request to clarify that proposed intervenors may participate, if at all, only in Phase Two of the litigation.

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[4] Proposed intervenors recognized that South Carolina had a right to obtain such documents through third-party subpoenas even if they were not permitted party status through intervention.

ARGUMENT

I. THE ISSUE BEFORE THE COURT IS ONE OF SUBSTANTIAL IMPORTANCE AND MERITS IMMEDIATE REVIEW

This Court has long held that, "[i]n original cases, . . . the [Special] [M]aster's recommendations are advisory only." *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980); *see also Kimberly v. Arms*, 129 U.S. 512, 523-24 (1889) ("[t]he information which [the Special Master] may communicate . . . is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment"); Robert L. Stern et al., *Supreme Court Practice* 577 (8th ed. 2002) ("[T]he Master's reports and recommendations are advisory only and are subject to exceptions and objections by the parties. The Court itself determines all critical motions and grants or denies the ultimate relief sought."). The Court thus plays a singular role in preventing unfair harm to one or more parties during the course of litigation. The Report's recommendation to permit intervention by three non-state actors would, if accepted, impose such harm by creating a substantial and immediate burden on South Carolina without appropriate legal or factual justification.

Now is the most effective time to review the Special Master's recommendation. The ordinary practice of Special Masters to submit an Interim Report upon referral of motions to intervene reflects the Court's interest in reviewing such motions *before* litigation continues for an extended time. *See, e.g., Guide for Special Masters in Original Cases Before the Supreme Court of the United States* 7-8 (Oct. Term 2004) (citing cases and specifically identifying motions to intervene as falling into a special category of motions

as to which the Court "want[s] the Master to file an Interim Report with a recommendation for disposition of the motion before going further").

Practical considerations fully justify adherence to the Court's typical practice here. Discovery and other proceedings before the Special Master are expected to go on for a period of years. Recognizing the irreparable injury South Carolina would suffer if proposed intervenors were permitted to participate as full parties before the Court resolves the intervention issues, the Special Master in CMO No. 7 stayed their participation — save for document discovery — pending this Court's review. Moreover, two of the proposed intervenors have stated (and the Special Master noted) that, if they are permitted to participate as full parties in all or part of the case, they will need additional time to conduct "catch-up" discovery. Sept. 26, 2008 Telephonic Conference Tr. at 12-13, 15-16. Accordingly, review is necessary and appropriate now to avoid further undue delay in proceeding to the deposition and trial phases of this case.

Discovery in this matter is in the early stages and will be extensive and costly to all involved. But South Carolina's burden will be substantially increased if the recommendation of the Special Master is adopted, due to increased litigation costs. Similarly, the costs incurred by the Special Master, which the parties must bear, will be likewise unnecessarily increased by proceeding with litigation involving intervention of three additional entities.[5]

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[5] The intervention-related costs incurred thus far have already been substantial. According to the Special Master, her office's fees through approximately November 2008 will likely be in excess of $118,000 for intervention-related issues and $60,000 for non-intervention-related issues. E-mail from Amy

It bears emphasis that South Carolina's financial burden resulting from intervention will be borne out of public funds, which are particularly constrained in the current economic climate.[6]

Notably, interstate water controversies similar to the one giving rise to this case persist between and among other States. The Court recently appointed

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Tovar to All Counsel (Oct. 30, 2008). If intervention is permitted, North Carolina and the proposed intervenors have already signaled that they will litigate to obtain a cost allocation whereby South Carolina would pay 50% of all costs in the litigation while North Carolina and the proposed intervenors would each pay only 12.5%, *see* North Carolina Letter Br. re Interim Allocation of Costs at 2 (Oct. 31, 2008), even though the presence of four entities on the defendants' side will greatly increase the overall costs of the litigation.

[6] In arguing that the Court should wait to review the intervention decisions until after discovery, trial, and the Special Master's issuance of a Final Report, CRWSP ignores the Court's usual practice of reviewing intervention decisions at the start, not the end, of the litigation (*see supra* pp. 7-8) and relies instead on inapposite cases that do not concern the Court's original jurisdiction. *See* CRWSP Letter Br. 2 (Dec. 8, 2008). CRWSP also argues that a denial of South Carolina's motion will not affect South Carolina because the discovery restrictions imposed on proposed intervenors relieve South Carolina of burdensome discovery obligations. *See id.* at 1-2. Yet it claims that, if the Court denies South Carolina's motion, "the discovery restrictions will be lifted and factual development will proceed," that is, proposed intervenors will seek to participate in depositions and submit multiple additional expert reports, thus increasing South Carolina's burden substantially. *Id.* at 3. That is precisely why, contrary to CRWSP's misreading of the Court's original jurisdiction jurisprudence, the remedy available to South Carolina subsequent to a Final Report is insufficient to ensure appropriate relief. The purpose of an Interim Report, and indeed the reason the Special Master has stayed full discovery pending the Court's review of the intervention issue, is to *prevent* harm to parties facing the discovery burdens of unlawful participation by proposed intervenors.

a Special Master in *Montana v. Wyoming/North Dakota*, No. 137, Orig., *see* 129 S. Ct. 480 (2008), which involves a claim for equitable apportionment of two area rivers. And Kansas again threatens to sue Nebraska for allegedly withdrawing too much water from the Republican River,[7] thereby violating a settlement among Colorado, Kansas, and Nebraska approved by this Court in 2003, following a lawsuit filed by Kansas in 1998. *See Kansas v. Nebraska*, 538 U.S. 720 (2003) (No. 126, Orig.). Additionally, Georgia has asked this Court to overturn a February 2008 ruling of the D.C. Circuit that the State needs congressional approval to use more water from Lake Lanier to supply the fast-growing Atlanta area. *See Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008), *petition for cert. pending sub nom. Georgia v. Florida, et al.*, No. 08-199 (U.S. filed Aug. 13, 2008).

As competing demands for water in the United States grow with population, conflicts over the apportionment of water sources will increase, and the Court is thus likely to confront the same question raised here with some frequency.[8]

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[7] *See* Assoc. Press, *Kansas Threatens to Sue Nebraska Over Use of a River*, N.Y. Times, Dec. 20, 2007, at A29, *available at* http://www.nytimes.com/2007/12/20/us/20water.html.

[8] *See, e.g.*, Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 Southeastern Envtl. L.J. 115, 115 (2004), *available at* http://www.olemiss.edu/orgs/SGLC/acf.htm; *cf. Hood ex rel. Mississippi v. City of Memphis*, 533 F. Supp. 2d 646, 651 (N.D. Miss. 2008) (dismissing for lack of jurisdiction a $1 billion lawsuit brought by Mississippi alleging that the City of Memphis, Tennessee, stole roughly 25 million gallons a day of Mississippi's water, and observing that the court "is not empowered to join Tennessee as a party to this action because original and exclusive jurisdiction of disputes between States

II. THE RECOMMENDATION THAT THREE NON-STATE ENTITIES BE ALLOWED TO INTERVENE IS INCONSISTENT WITH CONTROLLING PRECEDENT

The Special Master's recommendation that intervention be granted constitutes a sharp and unsupported departure from this Court's precedent. The recommendation should further be rejected because it relies on misapprehensions of South Carolina's Complaint.

A. The Report Departs From Court Precedent

This Court's precedent has consistently guarded the narrow confines of the Court's original jurisdiction granted by the Constitution. *See* U.S. Const. art. III, § 2, cl. 2 (permitting only those original actions involving "Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party"). This Court has repeatedly made clear that original actions are reserved for adjudication of disputes *between States* and not entities within those States. Thus, the Court has explained, "[w]e seek to exercise our original jurisdiction sparingly," and "individual users of water . . . ordinarily would have no right to intervene in an original action in this Court." *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *see also, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953) (per curiam) ("Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions."). The Court has never permitted intervention by a private water user in an equitable apportionment action, though it has repeatedly denied such requests. *See*,

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resides with the United States Supreme Court"), *appeal pending*, No. 08-60152 (5th Cir. argued Dec. 3, 2008).

e.g., *Arizona v. California*, 514 U.S. 1081 (1995) (denying motion of West Bank Homeowners Association for leave to intervene); *Nebraska v. Wyoming*, 507 U.S. 584, 589-90 (1993) (noting that the Special Master recommended denial of motions of various water users to intervene in an interstate water dispute, and those parties did not file exceptions to the Master's recommendation); *Arizona v. California*, 345 U.S. 914 (1953) (denying motion of Sidney Kartus et al. for leave to intervene); *New Jersey v. New York*, 345 U.S. at 372-74 (denying motion of City of Philadelphia for leave to intervene); *Nebraska v. Wyoming*, 296 U.S. 548 (1935) (denying motion of Platte Valley Public Power & Irrigation District for leave to intervene); *see also* Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (U.S. filed Nov. 27, 2001) (denying intervention as a party defendant in an action under the "equal footing doctrine" by private parties with an alleged interest in Alaskan waters).

Before granting a motion to intervene, the Court requires that a potential intervenor demonstrate (1) a "compelling interest in [its] own right," (2) "apart from [its] interest in a class with all other citizens and creatures of the state," (3) "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. That standard, which is based on the "'*parens patriae*' doctrine," reflects "the principle that the state, when a party to a suit involving a matter of sovereign interest, '*must* be deemed to represent all its citizens.'" *Id.* at 372 (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)) (emphasis added). This approach is a "necessary recognition of sovereign dignity, as well as a working rule for good judicial administration," so that

the Court is not "drawn into an intramural dispute over the distribution of water within [a State]." *Id.* at 373. Applying that test, the Court has previously denied similar efforts to intervene in an original action for equitable apportionment based on like claims, recognizing that any interest a city has in its "own water system . . . is *invariably* served by the [party State's] position" and further noting the city's failure to identify "a single concrete consideration in respect to which the [party State's] position does not represent [the city's] interests." *Id.* at 374 (emphasis added).

In this case, proposed intervenors have similarly failed to identify any interest not adequately represented by North Carolina. Moreover, North Carolina has disputed arguments that it will not represent the interests of intervenors. *See* May 27, 2008 Recommendation at 9 (referring specifically to Charlotte).[9] As in *New Jersey v. New York*, proposed intervenors seek to inject into this suit an intramural dispute about the allocation of water among individual water users within a State. But those users' state-law rights are adequately protected by North Carolina, *see New Jersey v. New York*, 345 U.S. at 373, 374; *Kentucky v. Indiana*, 281 U.S. at 173, whose *parens patriae* responsibilities necessarily preclude both "cities" and "corporate creatures of the state" from intervention in cases involving equitable apportionment, *New Jersey v. New York*, 345 U.S. at 372-74;

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[9] Further demonstrating that North Carolina is at least as equipped as proposed intervenors themselves adequately to represent their interests, counsel for Charlotte has asserted that "Charlotte desires and intends to coordinate with North Carolina on technical analysis and expert analysis and gathering of field data, if necessary." Aug. 22, 2008 Telephonic Conference Tr. at 24.

see also United States v. Nevada, 412 U.S. at 538; *accord Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995) ("We have said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.").

The Report relies for authority on this Court's cases (1) permitting participation by entities, including state public agencies, forcibly joined by plaintiffs as *defendants* (Report at 12-19); (2) permitting intervention in original (but not equitable apportionment) actions where intervention was unopposed and a third party's real property interest was adjudicated or a requirement that a pipeline company pay an allegedly unconstitutional state tax where no one State could adequately represent that company's interest (*id.* at 19-21); or (3) permitting intervention in water disputes by a sovereign Indian tribe (*id.* at 24-25). Those cases are inapposite. This case concerns (1) entities seeking to intervene, not entities named as party defendants; (2) state-law user rights of water — a fungible resource — not real property rights in land or a state tax laid directly on an intervenor's pipeline; or (3) intervention by non-sovereigns, not sovereign Indian tribes, whose unique status the Court has long recognized, *see, e.g.*, *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).

Although the recommendation recognizes that South Carolina is "master of its complaint," it states, without citation, that this rule "has less force in original jurisdiction cases," where the Court has discretion to decline to hear a dispute between two States or

can dismiss private parties named in a complaint. Report at 16-17. The Court's leading precedent is expressly to the contrary. In *New Jersey v. New York*, this Court rejected the City of Philadelphia's argument that it should be permitted to intervene because the City of New York, which had been "forcibly joined as a defendant to the original action," was already a party, noting that "New York City was not admitted into this litigation as a matter of discretion at her request." 345 U.S. at 374-75.

Moreover, the fact that this Court has, on one occasion identified by the Report (at 17-19), even expelled entities named as party *defendants* to an original action further demonstrates the limits of participatory rights in original actions. In *Kentucky v. Indiana*, the Court *dismissed* private defendants because the injunction sought against them by Kentucky "for the purpose of . . . restraining the prosecution of [a] suit in the state court" was "not needed, as a decree in this suit would bind the state of Indiana" and, therefore, would of its own force "bar any inconsistent proceedings" in Indiana state courts. 281 U.S. at 175. The same is true here. Any decree would bind proposed intervenors, "through representation by their respective States," from taking actions inconsistent with the decree. *Nebraska v. Wyoming*, 515 U.S. at 22. Therefore, to the extent *Kentucky v. Indiana* has relevance here, it suggests that South Carolina would have lacked the authority if it had named Charlotte, CRWSP, or Duke as a defendant in this case. But the observation that the Court has in one case *dismissed* non-essential, non-sovereign defendants in no way suggests that in another it can bypass the defendant State's duty as *parens patriae* to represent the interests of all citizens and *admit*

non-essential, non-sovereign defendants over the objection of the complaining State.[10]

Finally, the Report gives no weight (at 23) to the Court's requirement that a potential intervenor demonstrate a "compelling interest in [its] own right," "which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. at 373. Rather, the Special Master focuses on whether each proposed intervenor can demonstrate an interest without regard to the adequacy of North Carolina's ability to defend that intervenor's interests. That approach is inconsistent with this Court's longstanding view that intervention in original actions should be rare and its emphasis that, in an original action, "each State 'must be deemed to represent all its citizens.'" *Nebraska v. Wyoming*, 515 U.S. at 21-22 (quoting *Kentucky v. Indiana*, 281 U.S. at 173). At a bare minimum, the Court's standard requires a potential intervenor "to point out a single concrete consideration in respect to which the [State's] posi-

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[10] Most of the cases cited in the Report admitting third parties as party defendants were decided at a time when it was unclear whether private parties would be bound by the results of an equitable apportionment action if they were not joined by the plaintiff as party defendants. *See Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (raising but not deciding the question whether individual water-rights claimants in the defendant State should be joined as party defendants by the plaintiff State). "Not surprisingly, the practice soon developed of joining persons or entities within the defendant state whose claims appeared to be at stake." 4 Robert E. Beck et al., *Waters and Water Rights* § 45.03(b), at 45-20 (1991 ed., 2004 replace. vol.). In 1932, the Court clarified that an equitable apportionment decree binds the citizens. *See Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932); *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Since then, "individual water claimants usually have not been joined in equitable apportionment suits." 4 Beck § 45.03(b), at 45-21.

tion does not represent [the potential intervenor's] interests." *New Jersey v. New York*, 345 U.S. at 374.[11] The Report, however, does not identify *any* "concrete consideration" in which the interests of proposed intervenors diverge or in which North Carolina, as *parens patriae*, does not adequately represent their interests.

B. The Proposed Intervenors Are Not Entitled To Intervention

1. *Charlotte and CRWSP*

The Report reasons that, although there is no respect in which North Carolina does not adequately represent the interests of Charlotte and CRWSP, they may nonetheless properly intervene because certain of their water withdrawals are specified in the Complaint, making them "authorized agents" of South Carolina's alleged injury. Report at 21-28. However, as the Special Master held in Case Management Order No. 8 Regarding Scope of the Complaint, South Carolina has prayed for a decree equitably apportioning the Catawba River and challenges any and *all* withdrawals from the river in excess of North Carolina's equitable share; South Carolina does not limit its allegations of harm to any particular withdrawals. Case Management Order No. 8, at 4 (Sept. 24, 2008). Accordingly, under the Report's reasoning, potentially *all* North Carolina water users are "authorized agents" of South Carolina's harm. Water is, of course, largely fungible. The *cumulative* effect of the withdrawals in North Carolina results in low flows

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[11] *Cf.* 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1909, at 414-22 (3d ed. 2007) (under Federal Rule of Civil Procedure 24(a)(2), it will be presumed, "in the absence of a very compelling showing to the contrary, [that] . . . a state . . . adequately represent[s] the interests of its citizens").

across the border harming South Carolina; South Carolina's injuries are not limited to those caused by proposed intervenors' activity. It is of no consequence to South Carolina whether water is withdrawn by any specific North Carolina user; what matters is the amount of water ultimately available to South Carolina users downstream.

The Report elides that important characteristic of South Carolina's Complaint and thus fails to distinguish *New Jersey v. New York* and the defendant City of New York in that case. The *sole* basis of New Jersey's complaint against the State of New York was the City of New York's proposed construction of dams, and New Jersey's *sole* goal was to terminate construction of those dams.[12] On that basis, this Court accepted original jurisdiction over a suit in which New Jersey named the City of New York as a party defendant, while denying the City of Philadelphia's motion to intervene. South Carolina's Complaint here is broader than the authorized interbasin transfers of water by Charlotte and CRWSP — merely two entities in a class with all other citizens and creatures of the State,[13] *see New Jersey v. New York*,

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[12] *See* Report of the Special Master at 7-8, *New Jersey v. New York*, No. 16, Orig. (U.S. filed Feb. 2, 1931).

[13] The Report thus overstates the importance of South Carolina's choice to name two Interbasin Transfers ("IBTs"), among many others, in its Complaint. The two examples were chosen because they were recent, high-profile transfers that attracted substantial media attention, which made them — in South Carolina's view — particularly useful in describing both the current harms alleged in the Complaint and their continued effects for the foreseeable future. North Carolina has identified at least 22 other IBTs transferring water outside the Catawba River Basin, which North Carolina's interbasin transfer statute expressly authorizes (but for which a specific permit is not

345 U.S. at 373, who stand in the same position with regard to their interests in ensuring that any equitable apportionment enforced by the Court does not disrupt their current water usage. Accordingly, the Report, if accepted, would recognize the interests of entities in such a way as to preclude any "practical limitation on the number of citizens . . . who would be entitled to be made parties." *Id.*

Furthermore, in *New Jersey v. New York*, the City of New York was "forcibly joined as a defendant," not "admitted into th[e] litigation as a matter of discretion at her request." *Id.* at 375. The Report misunderstands the Court's observation that the City of New York was the "authorized agent" of injuries threatened against the citizens of New Jersey. *Id.* That observation was made merely to explain why the plaintiff in that case chose to name the City of New York as a defendant and *not* to illuminate anything about the relevant justification for permitting the City of New York to participate in the case — an issue that was not before the Court.

In sum, Charlotte and CRWSP are consumers of water from the Catawba River; the size of their withdrawals does not entitle them to independent party status when North Carolina can adequately represent their interests in its role as *parens patriae*.

2. *Duke*

The Special Master concluded that Duke has a "unique and compelling interest in defending the terms of its current [FERC] license and the [Com-

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required). *See* South Carolina Br. in Response to CMO No. 3 As to the Scope of the Complaint at 5 & Ex. 1 (Mar. 20, 2008). In addition, numerous other consumptive withdrawals are also affected on an ongoing basis.

prehensive Relicensing Agreement ("CRA"), pending before FERC]," May 27, 2008 Recommendation at 11, and that Duke's "interest in defending [the CRA], as well as its current and future licenses . . . , [is] sufficient to warrant intervention," *id.* at 12. But by its plain terms the CRA does not control any of the disputed water consumption in North Carolina that is at issue;[14] rather, it seeks to establish a protocol for whatever water remains in the Catawba River after North Carolina users have withdrawn water.[15]

South Carolina's Complaint alleges inequitable water consumption in North Carolina during times when the Catawba River's flow is inadequate. South

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[14] Duke's own relicensing application to FERC acknowledges and assumes that numerous actual or potential water withdrawals from the Catawba River will be under neither FERC's nor Duke's control. With respect to IBTs in particular, Duke's Application states as follows:

> **Inter-Basin Water Transfers:** Stakeholders are extremely concerned about the current and projected future amount of water being withdrawn from the Catawba-Wateree River Basin to be transferred to adjacent basins and not returned to the Catawba-Wateree River Basin. While growth in inter-basin transfers was included in future water demand projections, *this Application does not comprehensively assess nor take a position on the approval of such future requests. Public policy for inter-basin water transfers is clearly the exclusive jurisdiction of the state agencies and was, therefore, not addressed during the relicensing process.*

Duke Energy Application for New License at ES-21, Catawba-Wateree Project (FERC No. 2232) (FERC filed Aug. 29, 2006) (emphasis added).

[15] Indeed, § 39.9 of the proposed CRA expressly *disclaims* resolution of the water-rights issues raised in this case: "Water Rights Unaffected This Agreement does not release, deny, grant or affirm any property right, license or privilege in any waters or any right of use in any waters." CRA § 39.9.

Carolina seeks a decree from this Court that would curtail withdrawals from the river during times of inadequate flow, which would necessarily *increase* the amount of water available to Duke for the generation of hydropower and ultimately for discharge into South Carolina. Such increase in available water would make it easier, not harder, for Duke to meet any water supply obligations imposed by FERC.

The decree sought by South Carolina, therefore, neither threatens nor impairs Duke's ability to manage water in dispute here. Indeed, the only way in which South Carolina's request for a decree providing equitable apportionment could implicate Duke's interests would be if it limited Duke's ability to *consume* that water. Duke has not asserted any interests as a consumer of water, and, even if it had, it would nonetheless stand in the same position as Charlotte and CRWSP, whose interests as water users are not unique, but shared by a class of all citizens and creatures of the State, *see supra* pp. 18-19 (citing *New Jersey v. New York*, 345 U.S. at 373). To the extent Duke consumes water in North Carolina, that State represents its interests in this case; the same is true of South Carolina, to the extent Duke consumes water on that side of the boundary. In any event, this Court's determination of the party States' respective rights to the Catawba River poses no conflict with FERC's determination of the terms and conditions of Duke's hydropower license.[16] Rather

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[16] FERC's practice has been to craft licenses so as not to intrude on any equitable apportionment by the Court. *See, e.g., Virginia Electric Power Company d/b/a Dominion Virginia Power/Dominion North Carolina Power*, 110 FERC ¶ 61,241, at 61,948 (2005) ("[T]his Agreement shall not be construed to limit in any way any right of the State of North Carolina . . . to seek an equitable apportionment of the waters of the Roanoke

than allow Duke full party status, as the Report recommends, the Court can take judicial notice of the CRA's terms, in the event that it is approved by FERC.

Nor should Duke be permitted to intervene merely to provide the Court with access to information about Duke's operational control of river flows. If such information would aid the Court's analysis, as the Special Master suggests, *see* Report at 28-29, that information can be obtained through other means, such as third-party subpoenas. The appropriate role for interested persons with relevant matter not already brought to the Court's attention by parties to the case is that of *amicus curiae*.[17] The Court's practice of granting leave to non-governmental entities seeking to participate as *amici curiae*[18] under Rule 37.3[19] renders the *amicus* role better suited to balance the interests alleged in this case by Duke, as

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River."); *see also PacifiCorp*, 105 FERC ¶ 62,207, at 64,476 (2003) ("[n]othing in this article shall require the licensee to violate its obligations under . . . , or permit or require any action inconsistent with, the water contracts and agreements, interstate compact, judicial decrees, state water rights, and flood control responsibilities"), *clarified on reh'g*, 106 FERC ¶ 61,307 (2004).

[17] CRWSP concedes that, "whether the [proposed] Intervenors participate in this case as parties or as amici, their legal arguments would be the same." CRWSP Letter Br. 2.

[18] *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 749, 761 (2000) (observing the Court's "open door policy" toward *amicus curiae* briefs and documenting an 800% increase in the number of *amicus* filings during the last half of the twentieth century).

[19] A non-governmental entity may participate as an *amicus curiae* either with the consent of all parties, *see* Sup. Ct. R. 37.3(a), or with the Court's permission, *see* Sup. Ct. R. 37.3(b).

well as Charlotte and CRWSP, against the Court's precedent strongly disfavoring intervention under these circumstances. The Report fails to explain why such a role would not enable each of the proposed intervenors sufficient opportunity to represent their interests.

CONCLUSION

The motion of the State of South Carolina for leave to file exceptions to the First Interim Report of the Special Master should be granted, and briefing on those exceptions to be filed should be expedited to ensure a decision before the close of the October 2008 Term. In the alternative, the Court should deny the motions for leave to intervene for the foregoing reasons and those stated in South Carolina's previously filed oppositions to the motions for leave to intervene.

Respectfully submitted,

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December 9, 2008

IN THE
SUPREME COURT OF THE UNITED STATES

No. 138, Original

STATE OF SOUTH CAROLINA,
Plaintiff,

v.

STATE OF NORTH CAROLINA,
Defendant.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that all parties required to be served have been served. On December 9, 2008, I caused three copies of the Motion of the State of South Carolina for Leave To File Exceptions to First Interim Report of the Special Master and Brief in Support of Its Motion for Leave To File Exceptions to be served by first-class mail, postage prepaid, and by electronic mail (as designated) on the Special Master, the State of North Carolina, and each of the proposed intervenors on the attached service list.

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